ORAL ARGUMENT IS SCHEDULED FOR MARCH 7, 2003

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7197

ROGER W. MEHLE,
as managing fiduciary of the Thrift Savings Fund,
a Federal trust fund, and on its behalf,

Plaintiff-Appellant,

v.

AMERICAN MANAGEMENT SYSTEMS, INC.,

Defendant-Appellee.

On Appeal From The
United States District Court
For The District Of Columbia

BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 15(c)(3) and 28(a)(1), the undersigned counsel for plaintiff Roger W. Mehle state as follows:

A. Parties and Amici

1. Parties

The parties to this case are plaintiff and appellant Mehle and defendant and appellee American Management Systems, Inc.

2. Intervenor

The Department of Justice, on behalf of the United States, has been allowed to intervene in this appeal.

3. Amici Curiae

The following persons have been granted leave to appear as *amici curiae* by this Court: Vincent R. Sombrotto, President of the National Association of Letter Carriers; Robert L. Tunstall, Secretary-Treasurer of the American Postal Workers Union; Colleen M. Kelley, President of the National Treasury Employees Union; Richard N. Brown, President of the National Federation of Federal Employees; Clifford D. Dailing, Secretary-Treasurer of the National Rural Letter Carriers Association; Walter M. Olihovik, National President of the National Association of Postmasters of the United States; Joseph W. Cinadr, President of the National League of Postmasters of the United States; Ted Keating, Executive Vice President of the National Association of Postal Supervisors; Michael B. Styles, President of the Federal Managers Association; Charles Fallis, National Treasurer of the National Association of Retired Federal Employees; Freda Kurtz, Past President of Federally Employed Women, Inc.; Sandra Sue Adams-Choate, Assistant General Counsel – Legislation, for the American Federation of Government Employees; Richard

L. Strombotne of the Senior Executives Association; and Gary A. Edwards of the National Association of Government Employees.

B. Ruling Under Review

The ruling at issue in this Court is the order and memorandum opinion granting AMS's motion to dismiss for lack of jurisdiction entered on November 30, 2001, by Judge James Robertson of the United States District Court of the District of Columbia in *Mehle v. American Management Systems, Inc.*, Case No. 1-01-01544-JR (reported at 172 F. Supp. 2d 203 (D.D.C. 2001)). J.A. 357.

C. Related Cases

This case has not previously been before this Court, and there are no related cases pending before this Court or any other United States Courts of Appeals. After this suit had been filed in district court, AMS brought suit against the United States in the United States Court of Federal Claims, *American Management Systems, Inc. v. United States*, 01-586C, based on the same contract at issue in this case.

STATEMENT REGARDING DEFERRED APPENDIX

A deferred appendix will not be used.

CORPORATE DISCLOSURE STATEMENT

Plaintiff brings suit on behalf of the Thrift Savings Fund, a retirement fund for Federal employees. Plaintiff is also the Executive Director of the Federal Retirement Thrift Investment Board, the operating instrumentality of the Fund. Neither the Fund nor the Board issues stock to the public.

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GLOSSARY

AMS	American Management Systems, Inc.
AG	Attorney General of the United States
Board	The Federal Retirement Thrift Investment Board
CDA	Contract Disputes Act, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended 41 U.S.C. §§ 601-613)
DOJ	Department of Justice
ERISA	The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended 29 U.S.C. §§ 1001-1461)
FERSA	Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (codified as amended largely at 5 U.S.C. §§ 8351 and 8401-79)
Fund	Thrift Savings Fund
J.A.	References to Joint Appendix
NAFI	Non-appropriated fund instrumentality
OLC	Office of Legal Counsel of the Department of Justice
Plan	Thrift Savings Plan
PRA	Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended 39 U.S.C. §§ 101-5605)
System	The Federal Retirement Thrift Investment Management System

INTRODUCTION

This appeal presents the question whether Congress's decision to give control of Thrift Savings Fund assets to the Executive Director of the Federal Retirement Thrift Investment Board, in order to insulate those assets from political control, can be overridden by the general proposition that the Attorney General controls litigation involving the Executive branch.

In enacting the Federal Employees' Retirement System Act of 1986 ("FERSA"), Congress gave the Executive Director control over assets belonging to the Fund. The Fund asset at issue here is a legal claim for the recovery of monies paid from the Fund to AMS as a result of AMS's fraudulent inducement and fraudulent performance of a contract to build an automated record keeping system for the Thrift Savings Plan. The Executive Director filed suit in the United States District Court in his capacity as managing fiduciary of the Fund – in effect its trustee – to recover those monies. AMS moved to dismiss the complaint on the grounds, *inter alia,* that the decision to bring such a lawsuit, and the prosecution of that lawsuit, belong solely to the DOJ.

The district court granted AMS's motion to dismiss, holding that, because there was no explicit statutory provision giving the Executive Director the authority to sue to recover Fund monies independent of DOJ control, any such suit must be conducted by the DOJ. In so holding, the district court ignored controlling authority, ignored the statutory scheme making the Executive Director the sole decision-maker on the disposition of Fund assets, and ignored Congress's deliberate efforts to insulate the Fund from political interference in Fund management.

Congress chose to model FERSA on the statute applicable to private retirement plans, the Employee Retirement Income Security Act of 1974 ("ERISA"). In so doing, Congress patterned the duties and responsibilities of the Fund's Executive Director on those of an ERISA trustee.

Like a trustee of an ERISA trust, the Executive Director is empowered to pursue claims for recovery of monies on the Fund's behalf. DOJ control over such claims would undermine Congress's intention to vest the Executive Director – an officer with an undivided duty of loyalty to Fund participants and beneficiaries – with control over Fund assets.

AMS has raised other jurisdictional objections to the Executive Director's lawsuit that the district court did not address. As explained below, none presents an obstacle to the Executive Director's prosecution of this lawsuit.

Therefore, the decision of the district court should be reversed and vacated, and this case remanded for a trial on the merits of the underlying claim.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this dispute pursuant to 28 U.S.C. § 1332, because plaintiff and defendant are citizens of different states and the amount in controversy exceeds $75,000. J.A. 9. The district court also had jurisdiction under 28 U.S.C. § 1331, because this suit involves a Federal contract with a Federal entity "arising under" Federal common law.[1] AMS disputes these jurisdictional bases.

Jurisdiction is proper in this Court because on December 5, 2001, plaintiff timely filed a notice of appeal of the district court's November 30, 2001, final order dismissing the complaint. 28 U.S.C. § 1291.

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[1] Plaintiff did not allege Federal question jurisdiction in the complaint because the complaint set forth a basis for jurisdiction under the diversity statute. J.A. 9. The Court, however, may recognize this separate basis for jurisdiction on appeal even though it was not pleaded below. 28 U.S.C. § 1653; *Goble v. Marsh*, 684 F.2d 12, 17 (D.C. Cir. 1982) (in section 1653, "Congress intended to permit amendment broadly to avoid dismissal of suits on technical grounds").

STATEMENT OF ISSUES

(1) Whether, in FERSA, Congress created a statutory scheme whereby the Executive Director is authorized to control a litigation claim that is an asset of the Fund.

(2) Whether the district court has diversity jurisdiction over this lawsuit between a Federal officer and a citizen of a different state.

(3) Whether a dispute with a Federal entity involving fraud in connection with a Federal contract "arises under" the laws of the United States for purposes of Federal question jurisdiction.

(4) Whether the Contract Disputes Act bars plaintiff's suit given that the CDA does not apply to claims "involving fraud" or to disputes involving non-appropriated fund instrumentalities.

STATUTES AND REGULATIONS

The text of relevant statutes and regulations are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

A. Nature of the Case and Procedural History

This appeal results from the district court's dismissal of plaintiff's complaint against AMS for lack of jurisdiction. Plaintiff is the Executive Director of the Board, an independent establishment in the Executive branch, and, as such, is the managing fiduciary of the Fund. Plaintiff brought suit against AMS on July 17, 2001, after the Board discovered AMS's fraudulent conduct in the inducement and performance of a contract between AMS and the Board for the development of an automated record keeping system for the Fund. J.A. 5. The complaint seeks to recover the $50 million paid from the Fund, and exemplary damages of $300 million. J.A. 5.

On September 6, 2001, AMS moved to dismiss the complaint for lack of jurisdiction. J.A. 56. AMS argued that only the DOJ could initiate and maintain proceedings to recover damages to the Fund. The DOJ joined in this argument below, J.A. 342, although it did not move to intervene. The district court granted AMS's motion and issued a memorandum opinion holding that the Executive Director lacked independent litigation authority. J.A. 358. That opinion relegated the controlling authority on this question, *Mail Order Association of America v. United States Postal Service*, 986 F.2d 509 (D.C. Cir. 1993), to a footnote. J.A. 362.

Plaintiff timely appealed. J.A. 365. AMS thereafter filed three separate motions before this Court: a motion to strike the appearance of private counsel, a motion for summary affirmance, and a motion to dismiss the appeal. The DOJ separately moved to intervene and to dismiss the appeal. On May 9, 2002, this Court, per Judges Randolph, Rogers, and Garland, granted the DOJ's motion to intervene and denied AMS's motion for summary affirmance. The Court further ordered that AMS's and DOJ's motions to dismiss and AMS's motion to strike the appearance of private counsel be referred to the merits panel, and that the parties address the issues raised in those motions in their briefs.

After the Executive Director filed the district court action, AMS filed a complaint in the United States Court of Federal Claims against the United States, based on the same contract. J.A. 264. The DOJ, representing the United States, moved to dismiss AMS's complaint, arguing that the Court of Federal Claims lacked jurisdiction over the dispute under the "NAFI doctrine" because the Board's contract with AMS was funded solely by non-appropriated funds. J.A. 305. The Court of Federal Claims denied the motion to dismiss, concluding that the Board is not a NAFI. *American Mgmt. Sys., Inc. v. United States*, 53 Fed. Cl. 525 (2002). The United States has advised the Board that it is considering seeking an interlocutory appeal of that decision.

B. Statement of Facts

1. AMS's Fraud

In 1997, the Board entered into a contract with AMS to develop a computer record keeping system that would automate, simplify, and improve the Board's services to the Fund's then 2.5 million (now nearly 3 million) participants and beneficiaries. J.A. 6, 8, 28.[2] The record keeping system was paid for from the Fund and was a capital asset of the Fund (until written off as valueless in December 2001). In contracting with AMS, the Board relied on representations and promises from AMS that, among other things, it had expertise in the particular kind of software it proposed to develop, that it intended to deploy a system with minimal customization, and that it planned to devote specific experienced and knowledgeable personnel to develop a system for the Fund. J.A. 6. As the Board eventually discovered, however, these representations and promises were intentionally or recklessly false when made, or were made without any intention to perform. Indeed, AMS knew it lacked relevant experience with the software. After being awarded the contract for the project, AMS assigned teams of inexperienced and unqualified consultants to design the system with the purpose of inflating contract payments through over-customization of the software used. J.A. 23-24. As a direct result of AMS's actions, the project was an abject failure.

AMS's contract required it to deliver and implement a fully functioning system by May 1, 2000, at an estimated cost of approximately $30 million. J.A. 6. More than a year *after* this promised completion date, AMS had not completed its work and could not give the Board a credible schedule outlining how and when the project would be completed. J.A. 46-47. Worse

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[2] In an appeal from the grant of a motion to dismiss, the Court takes the factual allegations in the complaint as true. *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

still, AMS informed the Board that, despite the delay, it would only be able to deliver a reduced-function system, if it were able to deliver anything at all, at a cost to the Fund of more than $87 million – nearly three times the contractually agreed price. J.A. 6.

Throughout the period of performance, AMS induced the Board to pay it millions of dollars from the Fund by misrepresentations of continued progress and concealment of the defects of its system design and its mismanagement of the project. J.A. 30, 33, 37. When it became apparent to the Board that it had been misled and that AMS could not timely and cost-effectively remedy the defects of its system, the Board's contracting officer terminated AMS's contract for default. J.A. 47. The Executive Director, with the unanimous approval of the five presidentially appointed Board members, filed his complaint seeking to recover for the Fund the $50 million paid to AMS and to others in connection with the project, as well as exemplary damages of $300 million. J.A. 5, 298.

2. The Fund and Its Management

a. The Fund

The Fund is the centerpiece of the Federal Retirement Thrift Investment Management System, which offers employees of the Federal government the same types of retirement savings options and tax benefits, through the Plan, that many private corporations offer their employees through Internal Revenue Code section 401(k) plans. The Fund consists of amounts contributed to it by participating Federal employees and by employing agencies on their behalf, amounts assessed against employing agencies for the purchase of fiduciary insurance, and earnings (or losses) on the investments of the Fund. 5 U.S.C. § 8437(b). Other than an initial appropriation from Congress in 1986 to permit the System to commence operations, *see* Pub. L. No. 99-335, § 701, 100 Stat. 631 (1986), the Fund has never received any monies from the public fisc. In-

stead, expenses of administering the Fund are paid first from forfeitures from Plan participants' accounts and then from earnings thereon. 5 U.S.C. § 8437(c)(3).

When the Fund was created, Congress correctly anticipated that the Fund would accumulate significant assets. Consequently, Congress worried about the "specter of political involvement in the thrift plan management" and possible manipulation through "pressure from an Administration." H.R. Conf. Rep. No. 99-606, at 136 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1508, 1519. Congress accordingly supplied several layers of insulation between the management of the Fund and the rest of the Executive branch.

Specifically, Congress created the Fund along the lines of an ERISA trust, and incorporated many ERISA provisions into the new statute. As FERSA's Senate Committee Report explained, "To the extent possible, the Federal Retirement Thrift Investment Management System meets the requirements of [ERISA]." S. Rep. No. 99-166, at 72 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1405, 1477. Like its private-sector counterparts, *see* 29 U.S.C. § 1103(a), the amounts in the Fund are held in trust for the benefit of the System's participants and their beneficiaries:

> All sums contributed to the Thrift Savings Fund by an employee or Member [of Congress] or by an employing agency for the benefit of such employee or Member and all net earnings in such Fund attributable to investment of such sums are held in such Fund *in trust* for such employee or Member.

5 U.S.C. § 8437(g) (emphasis added). Monies in the Fund must be used for the exclusive benefit of the participants and their beneficiaries. *See id.* § 8437(e)(1) ("[S]ums in the Thrift Savings Fund credited to the account of an employee, Member, former employee, or former Member may not be used for, or diverted to, purposes other than for the exclusive benefit of the employee, Member, former employee, or former Member or his beneficiaries under this subchapter.").

Even though Congress decided that the Fund's monies would be held in an account in the United States Treasury, *see id.* § 8437(a), it recognized that those monies belong solely to the Plan's participants and beneficiaries. Congress explained that no portion of the monies in the Fund belongs to the United States:

> Unlike a defined benefit plan where an employer essentially promises a certain benefit, a thrift plan is an employee savings plan. In other words, *the employees own the money*. The money, in essence, is held in trust for the employee and managed and invested on the employee's behalf until the employee is eligible to receive it. This arrangement confers upon the employee property and other legal rights to the contributions and their earnings. Whether the money is invested in Government or private securities is immaterial with respect to employee ownership. *The employee owns it, and it cannot be tampered with by any entity including Congress*.

H.R. Conf. Rep. No. 99-606, at 137, *reprinted in* 1986 U.S.C.C.A.N. at 1520 (emphases added). Indeed, the General Accounting Office has confirmed that "the Fund's transactions should not be considered transactions of the Federal government and, therefore, should not be included in the budget's totals." J.A. 127 (Letter of Frederick D. Wolf, Director, Accounting and Financial Management Division, GAO, to Rep. Willis Gradison, B-227344 (May 29, 1987)); *see also* H.R. Conf. Rep. No. 99-606, at 138, *reprinted in* 1986 U.S.C.C.A.N. at 1521 (noting that the Board is an "off-budget agency").

b. Fund Management

To insulate the Fund further from political control and minimize risk to its assets, Congress created a structure for Plan governance that separated control over the Fund from the rest of the government. Congress provided for five part-time, presidentially appointed Board members to establish policies for the investment and management of the Fund and for the administration of the System. 5 U.S.C. §§ 8472(a), (b). The Board members select a full-time Executive Director, the Fund's manager, and retain supervisory control over his activities. *Id.* §§ 8472(g)(1)(B), 8474(a)(1). The Board members, however, have no power to disburse funds,

to direct the assets of the Fund into particular investments, or to enter into contracts on the Fund's behalf.[3]

Congress placed the job of day-to-day Fund management, such as investing assets, paying benefits, and administering the System, in the hands of the Executive Director, a position currently held by Mr. Mehle. *Id.* § 8474(b). The Executive Director alone is authorized to make such payments from the Fund as he determines are necessary to carry out his responsibilities. *Id.* § 8474(c)(5). He can hire personnel to help him manage the Fund and pay them appropriate compensation. *Id.* §§ 8474(c)(2), (c)(6). He may delegate to these employees such of his functions as he considers necessary or appropriate (including entering into contracts such as the one with AMS). *Id.* §§ 8474(b)(4), (c)(8). He may prescribe regulations necessary to carry out his responsibilities and may "take such other actions as are appropriate to carry out the functions of the Executive Director." *Id.* §§ 8474(c)(1), (c)(9). With only one narrow exception, the Board members have no authority to instruct the Executive Director to dispose of particular Fund assets or to invest in others. *Id.* § 8472(g)(2). Once appointed by the Board members, the Executive Director is subject to removal only by the vote of four of the five Board members, and then only for "good cause shown," *id.* § 8472(g)(1)(C), an institutional arrangement that further insulates the Executive Director from potential political pressure on the Board members.

The Board members and the Executive Director are fiduciaries of the Fund, in the same manner as fiduciaries of an ERISA plan. *Compare id.* § 8477(b)(1), *with* ERISA, 29 U.S.C.

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[3] Congress limited the Board members' power over the assets of the Fund because "the Board, composed of Presidential appointees, could be susceptible to pressure from an Administration." H.R. Conf. Rep. No. 99-606, at 136, *reprinted in* 1986 U.S.C.C.A.N. at 1519; *see also* S. Rep. No. 99-166, at 120, *reprinted in* 1986 U.S.C.C.A.N. at 1425 ("The Board will choose an executive director who will manage the thrift plan.").

§ 1104(a)(1). As such, they must discharge their responsibilities "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits . . . and defraying reasonable expenses of administering the Thrift Savings Fund." 5 U.S.C. § 8477(b)(1).

STANDARD OF REVIEW

Because this case involves an appeal from the district court's dismissal of the complaint for lack of jurisdiction, the issues presented herein are subject to *de novo* review by this Court. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995). The factual allegations in the complaint must be taken as true. *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993). Issues of statutory construction are subject to *de novo* review in this Court. *United States v. Wilson*, 290 F.3d 347, 352 (D.C. Cir. 2002).

SUMMARY OF ARGUMENT

The district court erred in holding that the Executive Director – acting with the unanimous approval of the Board members – lacked authority to bring this action on behalf of the Fund. The district court failed to apply this Court's holding in *Mail Order Association of America v. United States Postal Service*, 986 F.2d 509 (D.C. Cir. 1993), to the facts of this case. Instead, the court applied an improper "magic words" requirement to the question of independent litigation authority. Had the district court correctly applied the *Mail Order* case, it would have concluded that the Executive Director, as the Fund's full-time managing fiduciary – effectively its trustee – has the right to bring the instant suit on behalf of the Fund and that Congress intended that the suit not be subject to DOJ control. Further, the court would have recognized that Congress excluded other members of the Executive branch from deciding whether and how to dispose of specific Fund assets, having specifically provided that the Executive Director alone has the power to do so. The congressional plan precludes DOJ control over how or whether to pursue legal claims belonging to the Fund.

AMS has raised several other procedural objections to this suit below and in motions before this Court. All are without merit.

First, AMS claims that this appeal must be dismissed because it is brought without the approval of the Solicitor General. Just as the Executive Director is able to bring this suit independent of the DOJ, he is also exempt from Solicitor General control over this appeal.

Second, AMS objects to the appearance of private counsel for the Executive Director in this appeal, citing 5 U.S.C. § 3106. Section 3106 by its terms, however, does not apply to "independent establishments" such as the Board.

Third, AMS contended that the Executive Director is not the real party in interest to pursue this claim. A trustee, however, is the proper party to represent a trust's interests. Fed. R. Civ. P. 17(a).

Fourth, AMS contends that the Executive Director does not have jurisdiction to sue in a United States District Court based upon diversity because he must be deemed to be a citizen of each state. But the Executive Director is a citizen of the District of Columbia, and, in his representative capacity as a trustee, it is his citizenship that is relevant to a diversity determination. *See, e.g., Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462 (1980) ("[T]rustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship."). Moreover, in *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370, 376 (D.C. Cir. 1976), this Court held that diversity jurisdiction lies in suits involving Federal officials where the official's citizenship is diverse from that of the opposing litigant. In any event, jurisdiction is proper under the Federal question statute because this dispute involves a contract with a Federal entity to which Federal common law applies, and therefore it arises under the laws of the United States for purposes of Federal question jurisdiction.

Fifth, AMS maintains that the CDA bars plaintiff's complaint. Claims involving allegations of fraud, such as those alleged here, however, are statutorily exempt from the CDA and are properly adjudicated in district court. Further, the Board is a NAFI, and the CDA does not apply to disputes involving NAFIs.

The district court's dismissal of the complaint for lack of jurisdiction should therefore be reversed and vacated, and the case should be remanded to the district court for a trial on the merits.

ARGUMENT

I. THE EXECUTIVE DIRECTOR MAY BRING SUIT INDEPENDENT OF DEPARTMENT OF JUSTICE CONTROL.

AMS and the DOJ argue that any suit by the Fund must be subject to exclusive DOJ control pursuant to 28 U.S.C. §§ 516 and 519. The district court erroneously agreed and applied the wrong standard to dismiss plaintiff's complaint. As set forth below, these statutes do not present an impediment to plaintiff's lawsuit.

A. An Exception to Sections 516 or 519 Need Not Be Explicit Under This Court's *Mail Order* Decision.

The district court correctly observed that Congress as a general matter has granted the DOJ control over claims involving the United States, its agencies or its officers. J.A. 361. Congress, however, never intended for the DOJ to control *all* such litigation. Instead, Congress provided that the DOJ would control such litigation "*[e]xcept* as otherwise authorized by law." 28 U.S.C. §§ 516, 519 (emphasis added). The district court's order dismissing the complaint stems from the premise that in order to create such an exception to these statutes, Congress had to use specific words. J.A. 361 ("Only explicit statutory language vesting independent litigation authority in another agency creates an exception to § 516."). That premise is error; particular language is not required.

This Court has already held that, for Congress to create an exception under 28 U.S.C. §§ 516 or 519, it need not ritualistically recite "magic words." The lead case on the question of independent litigation authority in this Circuit makes this point clear. In *Mail Order Association of America v. United States Postal Service*, 986 F.2d 509 (D.C. Cir. 1993), this Court rejected the notion that specific words must be used to grant independent litigation authority:

> Indicating these [litigation] responsibilities by reference to or incorporation of other provisions or other statutes only adds a few steps to the analysis. It does not make Congress' intent ambiguous or unclear. The will of Congress can be apparent from the structure and purposes of the statute, as well as from a single provision.

Id. at 526. Other cases have reached the same conclusion. *TVA v. EPA*, 278 F.3d 1184, 1191-93 (11th Cir. 2002) (history of the TVA and its intended independence suffice to demonstrate congressional intent that the TVA exercise independent litigation authority without explicit statutory grant); *SEC v. Robert Collier & Co.*, 76 F.2d 939, 939-41 (2d Cir. 1935) (Hand, J.) (legislative history shows intent to confer on SEC ability to prosecute certain actions on its own behalf); *FDIC v. Irwin*, 727 F. Supp. 1073, 1075-76 (N.D. Tex. 1989) (sue and be sued clause and broad powers provided in the FDIC statute evidenced congressional intent to give independent litigation authority), *aff'd*, 916 F.2d 1051 (5th Cir. 1990). Indeed, one of the very cases relied upon by the district court concludes that an exception to sections 516 and 519 need not use explicit language. J.A. 362. In *Comptroller of the Currency v. Lance*, 632 F. Supp. 437 (N.D. Ga. 1986), the court held that the statutory authorization for the Comptroller of the Currency "to administer and *enforce*" certain provisions of the securities laws was sufficient to create independent litigation authority. *Id.* at 440 (emphasis in original). In that case, the court looked at the language of the Exchange Act, its legislative history, and the structure of the Securities and Ex-

change Commission to conclude that the Comptroller had the "specific authorization" necessary to proceed without DOJ control. *Id.* at 439-41.[4]

Because "magic words" are not needed to establish independent litigation authority for an officer or agency of the United States, the district court below applied the wrong legal standard when it held that "[o]nly explicit statutory language vesting independent litigation authority in another agency creates an exception" to sections 516 and 519. J.A. 361. The district court's undeniable application of the incorrect legal standard requires that the decision below be reversed and this case be remanded.

B. Under *Mail Order*, the Executive Director Has Independent Litigation Authority.

This Court's decision in *Mail Order* controls the outcome here. In *Mail Order*, this Court concluded that the Postal Reorganization Act ("PRA") authorized the Postal Service to represent itself in a lawsuit even though its enabling statute did not explicitly so provide. The Court analyzed a suit brought by the Postal Service against the Postal Rate Commission under 39 U.S.C. § 3625(c) – a statute providing that the "Governors may, under protest, allow a recommended [Postal Rate Commission] decision to take effect and . . . seek judicial review . . . under section 3628 of this title." *Mail Order*, 986 F.2d at 510-11.

The Court recognized that the PRA did not explicitly state that the Postal Service could bring suit without the control of the DOJ. Indeed, part of the statute, 39 U.S.C. § 409(d), sug-

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[4] Other authority relied upon by the district court similarly undermines its conclusion that exceptions to sections 516 and 519 must use "explicit statutory language." J.A. 361. In *United States v. Alky Enters., Inc.*, 969 F.2d 1309, 1314 (1st Cir. 1992), the court addressed whether the ICC had authority independently to seek certain civil penalties. The underlying statute did not contain explicit language on that question. Rather than presume DOJ control, the court instead looked at the legislative history to determine whether Congress intended for the DOJ to have the authority over such claims.

gested the opposite, by requiring that the Postal Service seek legal representation from the DOJ under certain circumstances. *Mail Order*, 986 F.2d at 510, 522-23. Nevertheless, the Court concluded that the Postal Service had the authority to control the lawsuit. First, it pointed out that under the PRA, the Postal Service is "entitled to appear as a party and be represented by counsel in any judicial review proceeding" under section 3628. *Id.* at 518. Second, the Court said that with respect to the aggrieved Federal agency, "we must inquire whether its right to appear and be represented by counsel is subject to the Attorney General's control – and therefore, veto." *Id.* That inquiry, the Court explained, required a review of the legislative history of the agency's enabling statute, *id.*, and consideration of the structure of the statute, *id.* at 519. The Court gave great weight to the congressional desire to give the Postal Service "independence from political pressures." *Id.* The Court also said that one was "to prefer the more specific statute over a conflicting general one." *Id.* at 515. The Court concluded that the PRA, although it did not contain an express grant of independent litigation authority, nonetheless conveyed such authority to the Postal Service.

The Executive Director fits within the *Mail Order* analysis because he has the absolute right to appear on behalf of the Fund in any litigation concerning the Fund, 5 U.S.C. § 8477(e)(8)(B), but in particular to recover its assets, and because DOJ control over his right cannot be squared with the structure and legislative history of FERSA. His right to represent the Fund's interests follows not only from the explicit language of FERSA, but also from the Executive Director's comprehensive managerial relationship to the Fund. Congress created the Fund in the mold of an ERISA trust, and created the position of Executive Director to function as does an ERISA trustee. Like an ERISA trustee, or the trustee of an express trust at common law, the Executive Director must necessarily be able to appear as a plaintiff to recover assets belonging to

the trust. Subjecting that right to DOJ control would upset the structure that Congress carefully created to insulate the assets of the Fund from Executive branch control. Thus, under *Mail Order*, the Executive Director has independent litigation authority.

1. The Fund Is a Trust, and the Executive Director Is Its Trustee.

Congress created the Fund as a trust. FERSA expressly provides that "[a]ll sums contributed to the Thrift Savings Fund . . . and all net earnings in such Fund attributable to investment of such sums are held in such Fund in trust . . . ." 5 U.S.C. § 8437(g); *see also* H.R. Conf. Rep. No. 99-606, at 137, *reprinted in* 1986 U.S.C.C.A.N. at 1520 ("[T]he employees own the money. The money, in essence, is held in trust for the employee and managed and invested on the employee's behalf until the employee is eligible to receive it.").[5] Congress intended that the Fund operate in a similar manner to an ERISA trust. *See* S. Rep. No. 99-166, at 72, *reprinted in* 1986 U.S.C.C.A.N. at 1477 ("To the extent possible, the [System] meets the requirements of [ERISA]."). To this end, it incorporated provisions from ERISA directly into FERSA, including the same stringent fiduciary duties owed under ERISA, *compare* 5 U.S.C. § 8477(b)(1), *with* 29 U.S.C. § 1104(a)(1), the same liability for breach of that duty, *compare* 5 U.S.C. § 8477(e)(1)(A), *with* 29 U.S.C. § 1109(a), similar causes of action, *compare* 5 U.S.C. § 8477(e)(3), *with* 29 U.S.C. § 1132(a) (civil actions), and identical bonding requirements, *compare* 5 U.S.C. § 8478, *with* 29 U.S.C. § 1112.[6]

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[5] Intervenor DOJ recognizes that the Fund is a trust: "All contributions in the Fund, and earnings on those contributions, are held in trust for the participants and their beneficiaries." J.A. 313.

[6] These fiduciary rules – a breach of which "would make the fiduciaries civilly and criminally liable" – are another safeguard against political manipulation. H.R. Conf. Rep. No. 99-606, at 136, *reprinted in* 1986 U.S.C.C.A.N. at 1519.

Every trust has a trustee. *Restatement (Second) of Trusts* § 2, cmt. h (1959) (elements of a trust include a trustee). The trustee of the Fund is the Executive Director. Under FERSA, he alone may invest and manage the Fund, 5 U.S.C. § 8474(b)(2), may make payments out of the Fund, *id.* § 8474(c)(5), may hire and compensate individuals, *id.* §§ 8474(c)(3), (6), (7), and may "take such other actions as are appropriate to carry out the functions of the Executive Director," *id.* § 8472(c)(9). Most importantly, Congress granted *only* to the Executive Director the power to invest or dispose of specific assets of the Fund. *Id.* § 8472(g)(2).[7] FERSA places limits on the exercise of that discretion, *id.* §§ 8472(g)(1)(B), 8474(b)(2), but it is hardly unusual for a trust instrument or the terms of an ERISA plan to so limit the discretion of a trustee. 29 U.S.C. § 1103(a)(1) (trustee subject to direction of named fiduciaries); *see also Restatement (Second) of Trusts* § 186 (trustee has such powers as are conferred by the terms of the trust).[8]

The Executive Director's authority to manage assets and his fiduciary obligations to the Fund establish his position as the Fund's trustee. As ERISA makes clear, individuals who pos-

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[7] The district court suggested that the five Board members, not the Executive Director, "are much more likely candidates" to be the Fund's trustees. J.A. 363. The text and structure of FERSA outlined above demonstrate that the Board members are instead analogous to "named fiduciaries" under ERISA, who appoint the trustee and subject him to general oversight. Like ERISA "named fiduciaries," the Board members oversee the *plan*, but do not manage its *assets*. *Cf.* 29 U.S.C. § 1102(a); 5 U.S.C. § 8472(f). The question, however, is academic because in any event the Board and the Executive Director between them clearly possess the totality of a trustee's traditional powers, and the Board members unanimously authorized the Executive Director to bring this lawsuit. J.A. 298. If this Court determines that the Board members are in fact the proper formal parties to bring this suit, the Executive Director requests that they be joined as additional plaintiffs. *See Swan v. Clinton*, 100 F.3d 973, 980 n.3 (D.C. Cir. 1996) (the Court has power to add parties on appeal). Their joinder will not destroy diversity; the citizenship of each of the five Board members is diverse from that of AMS. J.A. 298.

[8] The Executive Director is subject to the broad oversight of the Board members. In this respect, he is no different from an ERISA trustee who also must report to named fiduciaries under the plan. 29 U.S.C. § 1103(a)(1); 29 C.F.R. § 2509.94-2.

sess the power to manage trust funds, to invest their assets, and to make disbursements on the trust's behalf are trustees. 29 U.S.C. § 1103(a) (the trustee appointed by the named fiduciaries "shall have exclusive authority and discretion and manage and control the assets of the plan"); *id.* § 1105(c)(3) (under ERISA, the term "'trustee responsibility' means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan"). It is these powers that make the trustee, not the label. *Navarro Sav. Ass'n*, 446 U.S. at 463-64 (no requirement that an individual be called "trustee" when the "rights, powers and duties expressly assigned" to him necessarily give him that status) (quoting *Bullard v. City of Cisco*, 290 U.S. 179, 189 (1933); *Piambino v. Bailey*, 610 F.2d 1306, 1322-23 (5th Cir. 1980) (compliance officer, though not designated the trustee, was deemed the express trustee of a trust because he "was, in fact, the real fiduciary in the arrangement"). It is therefore immaterial that Congress did not use the word "trustee" when describing the Executive Director's position.

2. As Trustee, the Executive Director Has the Authority to Litigate on the Fund's Behalf.

As trustee, the Executive Director may litigate on the Fund's behalf to recover monies owed to the Fund. A trustee may always bring suit in the trustee's name to protect the interests of the trust. Fed. R. Civ. P. 17(a) ("trustee of an express trust . . . may sue in that person's own name without joining the party for whose benefit the action is brought"); *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1370 (10th Cir. 1998) (ERISA trustees may bring suit in own names under Rule 17(a)); 4 *Scott on Trusts* § 280, at 6 (4th ed. 1989) ("As against a person acting adversely to the trustee, it is the trustee who is the proper party to maintain an action at law or a suit in equity."). Indeed, the ability to bring suit is deemed part of the trustee's essential responsibilities. *Restatement (Second) of Trusts* § 177 (trustee's duties include duty to take reasonable steps to bring claims held by the trust); *id.* § 192 (trustee has discretion to compromise,

submit to arbitration or abandon claims affecting trust property); *see also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990) ("In most cases, a trustee has the *exclusive* authority to sue third parties who injure the beneficiaries' interest in the trust, including any legal claim the trustee holds in trust for the beneficiaries.") (emphasis added) (citations omitted).[9]

As a trustee, the Executive Director may sue on the Fund's behalf to recover its assets even though FERSA does not expressly so state. In this respect, the Executive Director's capacity to appear as trustee on behalf of the Fund mirrors the capacity of a trustee under ERISA to appear on behalf of an ERISA plan. An ERISA trustee has no general statutory authority to sue on claims belonging to a plan. Instead, ERISA provides only that trustees of an ERISA plan may bring lawsuits as fiduciaries against other fiduciaries for breach of fiduciary duty, or may sue to enforce provisions of ERISA or the plan. 29 U.S.C. § 1132(a)(2), (a)(3). Notwithstanding this narrow statutory grant, an ERISA trustee has broad power to sue, because Congress incorporated into ERISA the common law understanding of a trustee. As the Supreme Court has observed:

> [R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries [under ERISA], Congress invoked the common law of trusts to define the general scope of their authority and responsibility. Under the common law of trusts . . . trustees are understood to have all such powers as are necessary or appropriate for the carrying out of the purposes of the trust.

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[9] Citing *Navarro Savings Association v. Lee*, 446 U.S. 458 (1980), AMS contends the Executive Director cannot sue on the Fund's behalf because he does not have "legal title" to its assets. J.A. 76. *Navarro*, however, requires no such thing, and the assertion otherwise is not supported by law. *See, e.g., Piambino*, 610 F.2d at 1322-23 (compliance officer could sue even though bank held title to the trust); *Karras v. Teledyne Indus., Inc.*, 191 F. Supp. 2d 1162, 1172-73 (S.D. Cal. 2002) (commenting that plaintiff need not possess all the powers of the *Navarro* trustee).

Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985) (internal citations and quotations omitted).

Thus, courts have found that an ERISA trustee, just as any common law trustee, may represent the trust in claims beyond the narrow range of claims identified in section 1132(a). *Trustees of the Aftra Health Fund v. Biondi*, 303 F.3d 765, 782 (7th Cir. 2002) (permitting ERISA trustees to bring state common law fraud claim); *LeBlanc v. Cahill*, 153 F.3d 134, 146-48 (4th Cir. 1998) (same); *Aks v. Bennett*, 150 F.R.D. 187, 192 (D. Kan. 1993) ("The plaintiffs, as trustees of their respective plans, may maintain individual non-ERISA suits . . . on behalf of their plans."). FERSA's structure is identical to ERISA in this respect. Like an ERISA trustee, the statute is silent on whether the Executive Director may appear on behalf of the Fund generally to pursue claims belonging to the trust. Instead, FERSA copies ERISA's provision allowing suits by the Executive Director, as a fiduciary, against other fiduciaries for breach of fiduciary duty. *Compare* 5 U.S.C. §§ 8477(a)(3) *and* 8477(e)(3)(B), *with* 29 U.S.C. § 1132(a)(2). By adopting ERISA's structure into FERSA, Congress incorporated into FERSA the same understanding that a trustee may appear on behalf of the trust just as would a trustee at common law, notwithstanding the specific enumeration of possible actions in section 8477. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.").

Indeed, a trustee's ability to sue is so deeply ingrained in the common law that a trustee may sue even when a statutory scheme appears to *preclude* his ability to do so. In *Halladay v. Verschoor*, 381 F.2d 100 (8th Cir. 1967), the court analyzed whether the plaintiff in that matter, the trustee of a charitable trust, had the authority to bring a lawsuit even though the laws of the

state under which the trust was formed did not authorize such a suit. (State law abolished all trusts except those expressly authorized by statute. *Id.* at 105.) The statute authorizing the creation of a charitable trust provided only that "[t]he attorney general [of the state] shall represent the beneficiaries in all cases arising under this section and it shall be his duty to enforce such trusts by proper proceedings. . . ." *Id.* (citation omitted). The statute did not authorize the trustee to file any lawsuit. Nonetheless, the court found that the trustee's authority to sue was inherent in his status as trustee:

> The trustee's acceptance of the trust automatically carried with it the imposition on him of loyalty to the trust and the duty to preserve and protect the trust estate. With such high responsibility, it would be anomalous and completely impractical to rule that the trustee lacks authority to act not only to preserve and protect the trust estate but additionally for his self-protection regarding his obligation to the trust. In bringing suit against a third party for an alleged wrong to the trust, the trustee was only doing what he was morally and legally bound to do. Failure to take action under the circumstances here could have exposed him to personal liability for negligence.

Id. at 106.

Like the Eighth Circuit in *Halladay*, other courts of appeals have recognized that the special relationship of a managing fiduciary to a trust gives rise to the ability to sue under Fed. R. Civ. P. 17(a), even if the fiduciary in question is not expressly designated as trustee. *See, e.g.*, *Piambino*, 610 F.2d at 1323 (although not formally designated as trustee and holding no legal title, fiduciary had authority to bring legal action); *Board of Natural Res. v. Brown*, 992 F.2d 937, 941-43 (9th Cir. 1993) (state board of natural resources permitted to sue as trustee that managed the assets, even though the state and not the board held land in trust). By modeling the Executive Director's relationship to the Fund on that of an ERISA trustee, Congress imported the pervasive common law notion that a managing fiduciary has the ability to sue on the trust's be-

half.[10] Moreover, Congress specifically gave the Executive Director the right to intervene in actions involving the Fund (as specified in 5 U.S.C. § 8477(e)(8)(B)) and the plenary and residual power to take any action "appropriate to carry out the functions of the Executive Director" – which itself would permit the Executive Director to avail himself of the principles of trust law to protect the Fund's claims. 5 U.S.C. § 8474(c)(9). Congress intended, therefore, that the Executive Director be able to bring suit to vindicate the rights of the Fund, just as it intended that the Postal Service be able to bring suit to challenge decisions of the Postal Rate Commission.

3. Attorney General Control over the Executive Director's Lawsuit Is Inconsistent with FERSA.

As with the Postal Service in *Mail Order*, DOJ control over the Executive Director's right to appear on behalf of the Fund cannot be squared with FERSA's text, its structure, and the congressional intent underlying the statute. The DOJ maintains that it has "a broad grant of plenary power" to compromise, to settle, or even to decline to initiate litigation in its charge – including settling cases over the "client" agency's objection. *See, e.g.*, 6 Op. Off. Legal Counsel 47, 54, 59-60 (1982); 2 *Dep't of Justice Manual* § 4-3.100 (2d ed. 2000); J.A. 351. This type of control "and therefore, veto," *Mail Order*, 986 F.2d at 518, over Fund litigation would place decisions concerning Fund assets into the hands of the political leadership in the Executive branch.

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[10] Whether or not called a trustee, it is not a novel concept that a Federal official could sue in his capacity as manager of a Federal fund. *See Director, Office of Workers' Compensation Programs v. National Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979) ("The Director . . . has standing as a petitioner in this proceeding [appealing an award out of the fund] both because of his official responsibility for administration of the LHWCA and because of his financial interest as administrator of the special fund."); *Director, Office of Workers' Compensation Programs v. Eastern Coal Corp.*, 561 F.2d 632, 645 (6th Cir. 1977) ("It would be strange, indeed, if the designated representative of the United States government authorized by Congress to disburse millions of dollars in benefits to citizens could not appear as a party to represent the government in important litigation concerning the administration of the Act authorizing disbursement.").

The text and legislative history of FERSA express Congress's intent to preclude such political control over the assets of the Fund's private beneficiaries and participants. As in *Mail Order*, there is no room in FERSA for an AG veto over the decision of the trustee concerning whether and how to recover monies paid from the Fund. *Cf. id.* at 522.

a. Under FERSA, Only the Executive Director May Control the Disposition of Assets, Including the Fund's Litigation Claims Against AMS.

Congress specifically provided, in section 8472(g)(2) and elsewhere, that only the Executive Director can make the ultimate decisions affecting the disposition of assets belonging to the Fund. This lawsuit seeks the return to the Fund of monies that it paid to AMS, as well as damages that it suffered as a result of AMS's fraud. The Fund's chose in action against AMS is therefore an asset of value to the Fund's participants and beneficiaries no different in principle from the stocks, bonds, or other kinds of assets held by the Fund. *Health Cost Controls, Inc. v. Washington*, 187 F.3d 703, 709 (7th Cir. 1999) (Posner, C.J.) (claims held by ERISA plan treated as an asset); *see also Restatement (Second) of Trusts* § 83, cmt. a (trust can hold legal and equitable choses in action).

Under FERSA, only the Executive Director – not the AG – has the power "to dispose of or cause to be disposed of any specific asset of such Fund," 5 U.S.C. § 8472(g)(2), and he has power to "manage" the assets of the Fund as one of its fiduciaries. *Id.* § 8474(b)(2). Indeed, Congress expected the Executive Director to be the "primary manager of the Thrift Plan," with the many "discretionary functions" enumerated in 5 U.S.C. § 8474(c). S. Rep. No. 99-166, at 74-75, *reprinted in* 1986 U.S.C.C.A.N. at 1479-80. Section 8472(g)(2) directly contradicts the power that the district court assigned to the AG; the power to "dispose of or cause to be disposed of any specific asset of [the] Fund" – such as the Fund's claim against AMS – cannot belong to the AG when Congress has granted that power to the Executive Director exclusively.

The AG's control over this particular asset would be contrary to other aspects of the statute. In *Mail Order*, the Court noted that one of Congress's goals when it enacted the PRA was to protect the Postal Service from "political influence" and that "[t]he purpose of this political independence was managerial independence." 986 F.2d at 519. It recognized that Congress had carefully crafted a unique structure to meet these goals – "this was not a piecemeal or haphazard effort." *Id.* at 521. The Court concluded that DOJ control over the Postal Service litigation at issue would allow the DOJ to "completely and single-handedly obliterate this congressionally-authorized and congressionally-intended [process]." *Id.* at 522; *see also id.* at 517-18 (PRA cannot be read to "thwart the clear congressional intent"). It therefore declined to adopt the DOJ's application of sections 516 and 519.

Congress similarly maximized the Fund's independence from the rest of the Executive branch in order to safeguard the assets of the Fund from what it termed "the specter of political involvement." H.R. Conf. Rep. No. 99-606, at 136, *reprinted in* 1986 U.S.C.C.A.N. at 1519; *see supra* pp. 6-8. As was noted at the time: "A great deal of concern was raised about the possibility of political manipulation of large pools of thrift plan money. This legislation was designed to preclude that possibility." H.R. Conf. Rep. No. 99-606, at 136, *reprinted in* 1986 U.S.C.C.A.N. at 1519. As described above, numerous statutory provisions reflect this concern, including, among other things, Congress's decision to create the Fund as a trust, the decision to vest managerial authority over the trust only in the hands of those who owe an undivided duty of loyalty to the Fund's participants and beneficiaries, and the creation of several layers of insulation between the manager of that trust and the political leadership of the Executive branch. *See supra* pp. 7-10.

Congress's intent to limit DOJ control over Fund litigation is further evidenced by certain amendments to the statute. In 1988, two years after FERSA's enactment, Congress amended 5 U.S.C. § 8477 to give the DOJ control over a limited category of narrowly defined lawsuits brought by the Secretary of Labor under subsection (e)(3)(A) of that provision. *See* FERSA Technical Corrections, Pub. L. No. 100-238, § 133, 101 Stat. 1744, 1760-62 (1988); 5 U.S.C. § 8477(e)(4)(A). First, Congress amended subsection (e)(3)(A) to give DOJ control over some cases brought by the Secretary of Labor against certain Fund fiduciaries. *See* 5 U.S.C. § 8477(e)(4)(A). Second, Congress authorized the DOJ to "compromise or settle any claim asserted in such civil action." *Id.* § 8477(e)(4)(D). If the DOJ's control over FERSA litigation were already all-encompassing, such carve-outs would not be necessary. Congress did not similarly amend the statute to extend DOJ control to lawsuits brought by the Executive Director and the Board members in their fiduciary capacity. Under the principle of *expressio unius est exclusio alterius*, the Court thus should conclude that Congress intended to preserve the independence of suits brought by the Executive Director and Board members as fiduciaries. *See Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000) ("[W]here the context shows that the 'draftsmen's mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives,' the canon [*expressio unius*] is a useful aid."). To read FERSA otherwise would render the 1988 amendment superfluous.

b. Exclusive Attorney General Control over This Litigation Would Result in Conflicts That Congress Did Not Intend.

Further, Congress could not have intended that the DOJ have exclusive control over Fund litigation, because Congress provided that any person with discretionary control over Fund assets must exercise that control solely in the interests of the Fund participants and beneficiaries. Specifically, FERSA imposes a strict fiduciary standard on any person or entity "who . . . exercises

discretionary authority or discretionary control over the . . . disposition of the assets of the Thrift Savings Fund." 5 U.S.C. § 8477(a)(3)(C). Under this standard,

> [such a person must] discharge his responsibilities with respect to the Thrift Savings Fund or applicable portion thereof *solely in the interest of the participants and beneficiaries* and for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering in the Thrift Savings Fund or applicable portions thereof.

Id. at § 8477(b)(1) (emphasis added).[11]

There can be no doubt that DOJ control over Fund litigation would create a fiduciary obligation of the DOJ under this provision. Case law interpreting the identical fiduciary language of ERISA, 29 U.S.C. § 1002(21)(A), makes clear that a party who controls claims belonging to an ERISA plan becomes a fiduciary under the statute. *Health Cost Controls*, 187 F.3d at 709 (party with discretionary power over claims belonging to a plan becomes a plan fiduciary); *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988) (attorney representing a plan becomes a fiduciary if the attorney exercises authority over the plan other than by usual professional functions).

The DOJ has made plain that it will not and cannot meet that statutory requirement. Unlike a private attorney, the DOJ has rejected the notion that it should defer to the client on ultimate questions relating to a lawsuit, such as whether to bring a claim at all, whether to settle it, and the terms of any such settlement. Rather, the DOJ retains for itself all such decision-making authority. 6 Op. Off. Legal Counsel 47, 60 (1982) (AG has "virtually absolute discretion to determine whether to compromise or abandon claims"). As the DOJ itself explained in the district

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[11] The DOJ recognizes the strict fiduciary duties imposed by FERSA. *See* Appellant's Motion for Judicial Notice, Exh. 3, at 10 ("Again, because they are administered in a fiduciary capacity, the Act in section 8477 provides that all amounts in the fund shall be administered by the Executive Director, or any fiduciary for that matter, solely in the interests of the participants and beneficiaries.").

court, the AG has "a unique responsibility in handling litigation to heed government-wide interests" and to uphold the interests "of the United States as a whole, as articulated by the Executive." J.A. 351. Accordingly, the DOJ will override the policies of a client agency where the "'client' agency desires to . . . dissociate itself from legal or policy judgments to which the Executive subscribes . . . or . . . desires a legal result that will benefit" the interests of the agency without regard to the "broader interests of the United States government as a whole." 6 Op. Off. Legal Counsel at 62. As the DOJ acknowledged below, "Department of Justice attorneys representing the interests of the Fund *will* consider interests other than those of the Fund." J.A. 351 (emphasis added).[12]

FERSA's fiduciary standard is an essential part of the statutory scheme. Congress sought to safeguard Fund assets and insulate them from political manipulation by imposing a duty of undivided loyalty to Fund participants and beneficiaries on all those with discretionary authority over Fund assets. *See* H.R. Conf. Rep. No. 99-606, at 136, *reprinted in* 1986 U.S.C.C.A.N. at 1519. Because the DOJ has long held the view that it does not owe client agencies an undivided duty of loyalty, Congress should be presumed to have known about that view when it enacted FERSA. *See Wilson*, 290 F.3d at 357 ("Congress is presumed to be aware of established prac-

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[12] The DOJ has previously argued that it can simultaneously represent the Fund as well as any wider interests of the Executive branch. DOJ relies on *Nevada v. United States*, 463 U.S. 110 (1983), in that regard. J.A. 352. *Nevada*, however, contradicts the DOJ's position. In *Nevada*, the Supreme Court noted that Congress created a statutory obligation for the Department of the Interior to represent multiple interests. Specifically, Congress charged the Secretary of Interior to "carry water on at least two shoulders" by representing the competing claims of Indian tribes and reclamation projects to water rights. *Nevada*, 463 U.S. at 128. Moreover, the Court acknowledged that in such a situation the government cannot follow the "fastidious standards of a private fiduciary," *id.*, as is statutorily required of a fiduciary under FERSA. In this case, unlike *Nevada*, FERSA expressly provides that Fund fiduciaries' allegiance not be divided, but that it run solely to Fund participants and beneficiaries.

tices and authoritative interpretations of the coordinate branches" when enacting legislation.). That Congress imposed an undivided duty of loyalty on Fund fiduciaries further confirms that it could not have intended to grant the DOJ sole litigation authority.

The DOJ's hypothetical status as Fund fiduciary leads to other counterintuitive results. It would allow Fund fiduciaries and participants to sue the DOJ to enjoin it from taking an action contrary to the interests of the Fund – even if the DOJ took that action pursuant to its duty to the Executive branch. 5 U.S.C. § 8477(e)(3)(B). It would also seemingly authorize the Secretary of Labor to sue the AG for damages (even though she is expressly precluded from suing the Executive Director and the Board members). *Id.* § 8477(e)(3)(A). Stranger still, the DOJ may be required to represent both sides of Fund litigation. For example, if the DOJ were a fiduciary, the Secretary of Labor could sue the AG for breach of fiduciary duty under 5 U.S.C. § 8477(e)(3)(A), but such a suit would be under DOJ control pursuant to section 8477(e)(4)(A).

Anomalous and absurd outcomes such as these further confirm the conclusion, based on FERSA's text and structure, that Congress could not have intended that the DOJ maintain control over all Fund litigation.[13] *Cf. Algernon Blair Indus. Contractors, Inc. v. TVA*, 540 F. Supp. 551,

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[13] FERSA requires the Secretary of Labor to establish an audit program to determine the "level of compliance" of fiduciaries with their obligations under section 8477. 5 U.S.C. § 8477(g)(1). It also requires the Secretary to prescribe "procedures for allocating fiduciary responsibilities among fiduciaries." *Id.* § 8477(e)(1)(E). In light of these roles, the Board has sought an opinion from the Labor Department regarding the AG's putative status as a fiduciary by virtue of 5 U.S.C. § 8477(a)(3)(C) if the DOJ were to control this suit. The Labor Department has refused to address the subject, however, other than to state that it has no authority to opine on the matter. This refusal is an apparent abdication of the Secretary's responsibilities under FERSA. The Court may therefore wish to solicit an *amicus curiae* brief from the Labor Department on this subject. *See, e.g., Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 970 F.2d 1138, 1140 (2d Cir. 1992) (court solicited an *amicus* brief from the Department of Labor to "assist [it] in resolving the issue of fiduciary responsibility" under ERISA), *aff'd*, 510 U.S. 86 (1993).

556 (M.D. Ala. 1982) (rejecting DOJ control over TVA litigation and stating that "[t]he able attorney for DOJ [was] unable to suggest a satisfactory explanation of how the Attorney General can represent one party to litigation while he has the authority to control the litigation of the opposing party").

FERSA's structure and legislative history thus confirm that Congress intended the Executive Director, not the DOJ, to control this lawsuit. Following *Mail Order*, this Court should prefer the more specific statute to a general conflicting one. 986 F.2d at 515. The Court should reverse the district court's decision for that reason.

II. THE EXECUTIVE DIRECTOR HAS THE AUTHORITY TO BRING THIS APPEAL WITHOUT THE SOLICITOR GENERAL'S APPROVAL.

AMS contends that this Court lacks jurisdiction because the Executive Director cannot bring an appeal without the approval of the Solicitor General. The Solicitor General controls appeals only with respect to those activities otherwise subject to DOJ litigation authority under 28 U.S.C. §§ 516 and 519. 1 *Dep't of Justice Manual* § 1-2.104 (2d ed. 2000) ("In cases handled by independent regulatory agencies rather than by the Department, . . . the Solicitor General has no control over their appeal to intermediate appellate courts."). As set forth above, the Executive Director's ability to bring this case is not subject to sections 516 and 519. The Solicitor General, therefore, has no authority to control the Executive Director's decision to appeal.[14]

Moreover, if the Solicitor General could prevent the appeal of a district court's determination of an agency's independent litigation authority, the Executive branch would be able to deny appellate review of all such decisions. Accordingly, courts have permitted appellate review

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[14] AMS also relies on 28 U.S.C. § 518, which provides that the AG and the Solicitor General shall conduct all appeals in which the United States is interested before certain enumerated courts. This provision does not apply to appeals to this Court.

of an agency's claim to independent litigation authority without the Solicitor General's consent to such review. *See, e.g.*, *Mail Order*, 986 F.2d at 510-12; *see also TVA*, 278 F.3d at 1191-93.

For both of these reasons, this appeal may proceed without Solicitor General approval.

III. SECTION 3106 OF TITLE 5 DOES NOT PROHIBIT THE EXECUTIVE DIRECTOR FROM EMPLOYING THE SERVICES OF PRIVATE COUNSEL TO BRING THIS SUIT.

AMS argued in its Motion to Strike in this Court that the Executive Director may not use private counsel on this appeal under 5 U.S.C. § 3106. The contention is without merit.

Section 3106 prohibits "the head of an Executive department or military department" from employing outside counsel unless "otherwise authorized by law." "Executive department" includes the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education and Veterans Affairs. 5 U.S.C. § 101. This list is exclusive. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 886 (1991) ("Departments" are only those parts of the Executive branch expressly given the name "department" by Congress); *Honeycutt v. Long*, 861 F.2d 1346, 1349 (5th Cir. 1988) (Army and Air Force Exchange Service, though part of the Defense Department, is by definition not an "Executive department"); *Nanfelt v. United States*, 1 Cl. Ct. 223, 224 (1982) (Kozinski, C.J.) (5 U.S.C. § 101 defined "Executive departments" only as "Cabinet-level" departments listed). The list does not include the Executive Director or the Board.

By its express terms, section 3106 does not apply to an "independent establishment" such as the Board. The Board is an "independent establishment," *i.e.*, "an establishment in the executive branch . . . which is not an Executive Department, military department, Government corporation, or part thereof . . . ." 5 U.S.C. § 104(1). The Board falls within this definition because it is within the Executive branch, 5 U.S.C. § 8472, but is neither an executive department nor a government corporation, 5 U.S.C. § 104.

IV. JURISDICTION IS PROPER IN FEDERAL DISTRICT COURT.

AMS also attacks jurisdiction on the grounds that the Executive Director cannot invoke diversity jurisdiction to bring a lawsuit in United States District Court. The district court made no findings on that question. J.A. 360-61. Diversity jurisdiction is proper in this case, however, because the parties are of diverse citizenship. 28 U.S.C. § 1332. Even if the parties were not diverse, Federal question jurisdiction applies to this Federal contract with a Federal entity governed by Federal common law. 28 U.S.C. § 1331. Plaintiff's suit may proceed in United States District Court on either basis.

A. The Executive Director May Sue AMS in Diversity.

The district court has jurisdiction over the Executive Director's complaint under diversity pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states. The Executive Director is the equivalent of a common law trustee, and diversity jurisdiction is determined by the citizenship of the trustee. *Navarro Sav. Ass'n*, 446 U.S. at 462; *see also Lenon*, 136 F.3d at 1369-71 (citizenship of an ERISA trust is determined by citizenship of trustee). The Executive Director is a citizen of Washington, D.C. J.A. 297.

Moreover, a Federal official's place of citizenship is deemed to be the situs of the agency he heads. *Trans-Bay Eng'rs & Builders, Inc. v. Hills*, 551 F.2d 370, 376 (D.C. Cir. 1976). Plaintiff's agency is located in Washington, D.C. J.A. 5. A corporation is a citizen of its place of incorporation and its principal place of business. *District of Columbia ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1043 (D.C. Cir. 1986). It is undisputed that

AMS is headquartered in Virginia and incorporated in Delaware. J.A. 8, 69. The district court, therefore, has jurisdiction under the Federal diversity statute.[15]

AMS also contends that the Executive Director cannot invoke diversity jurisdiction because he is a Federal officer and so must be deemed to have citizenship in every state. J.A. 78. This Court, however, rejected that "every state" argument in *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370, 376 (D.C. Cir. 1976). In *Trans-Bay*, this Court allowed a Federal official to be sued in diversity, deeming her citizenship to be the situs of her agency. *Id.* at 376; 13B Charles Alan Wright, et al., *Federal Practice and Procedure*, Jurisdiction 2d § 3620, at 575 (2d ed. 1984) ("When a federal official is sued in an official capacity, citizenship will be determined in terms of the location of the agency or department involved.").

AMS cites no support for its argument that a Federal official may not invoke diversity jurisdiction as a plaintiff. It notes only that *Trans-Bay* has been criticized in certain decisions where suits have been brought *against* the government. J.A. 78-79. None of the cases cited by AMS addresses the issue presented here, that is, whether a Federal official may bring suit pursuant to the diversity statute. Also, those cases, unlike *Trans-Bay*, are not binding precedent in this Circuit. Therefore, this suit is properly in Federal court under diversity jurisdiction.

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[15] AMS has attacked the adequacy of the allegations regarding citizenship in the complaint. The complaint, however, alleges diversity of citizenship generally, J.A. 9, and provides the parties' addresses and the states of their residence. J.A. 5, 7-9. The record confirms that the parties are indeed diverse. J.A. 69. Therefore, there is a sufficient basis to establish diversity jurisdiction. *Sun Printing & Publ'g Ass'n v. Edwards*, 194 U.S. 377, 382 (1904) ("The whole record . . . may be looked to" for the purpose of determining citizenship, "if the requisite citizenship, is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient.").

B. Federal Question Jurisdiction Applies Because Federal Common Law Governs This Dispute.

The district court also has jurisdiction over this lawsuit because it involves a Federal question. At the heart of this dispute is a contract between a private party and an agency of the United States government, as AMS admits. J.A. 67. Specifically, the contract with AMS was signed by the Board's contract officer, himself an official of the Federal government. J.A. 28. He signed it pursuant to congressionally authorized power delegated to him by the Executive Director to "carry out the provisions of [FERSA]." 5 U.S.C. § 8474(c)(2). The contract was therefore entered into pursuant to the statutes of the United States and was in no way dependent on the laws of any state.

Federal common law applies in such circumstances to plaintiff's contract claims. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (Federal common law applies to commercial paper issued by United States pursuant to statutory authority); *United States v. Basin Elec. Power Co-op.*, 248 F.3d 781, 796 (8th Cir. 2001) ("Federal common law governs the interpretation and construction of a contract between the United States and another party."), *cert. denied*, 534 U.S. 1115 (2002). Federal common law also applies to the other claims made on behalf of the Fund. *See United States v. General Dynamics Corp.*, 19 F.3d 770, 773 (2d Cir. 1994) ("the government's common law right to recover funds wrongfully paid is well established"); *see also United States v. Kearns*, 595 F.2d 729, 732 (D.C. Cir. 1978) (noting that Federal common law applies *inter alia* to government tort actions).

This action, therefore, falls within the scope of the jurisdictional grant in 28 U.S.C. § 1331 applicable to any claim "arising under the Constitution, laws, or treaties of the United States." Actions that "arise under" Federal common law come within the district court's Federal question jurisdiction conferred by 28 U.S.C. § 1331. *Illinois v. City of Milwaukee*, 406 U.S. 91,

100 (1972) (section 1331 jurisdiction "will support claims founded upon Federal common law as well as those of a statutory origin"); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) ("When federal law applies . . . it follows that the question arises under federal law, and federal question jurisdiction exists."); *Western Sec. Co. v. Derwinski*, 937 F.2d 1276, 1280 (7th Cir. 1991) ("Suits to enforce contracts with Federal agencies are governed by Federal common law, and as a result arise under Federal law for purposes of section 1331.") (internal citations omitted). For those reasons, the district court properly has jurisdiction over the claims in the complaint.[16]

V. THE CONTRACT DISPUTES ACT DOES NOT BAR FEDERAL DISTRICT COURT JURISDICTION OVER THIS DISPUTE.

AMS also contends that the district court lacks jurisdiction over this action on the ground that a dispute involving a government contract *must* be resolved pursuant to the CDA, 41 U.S.C. §§ 601-613. The CDA, however, does not displace district court jurisdiction in this case for two reasons. First, plaintiff's complaint states claims based on fraud – which is an express exception to the CDA. Second, the CDA, in any event, is not applicable to this dispute because the Board is a non-appropriated fund instrumentality.

A. Under the Fraud Exception to the CDA, the District Court Can Exercise Jurisdiction over Plaintiff's Complaint.

The district court is not barred by the CDA from exercising its jurisdiction over plaintiff's claims. Although the CDA provides, generally, that "[a]ll claims by the government against a contractor relating to a contract" shall be resolved through a dispute process that ultimately in-

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[16] As noted above, plaintiff did not assert this basis for jurisdiction before the district court. If the Court considers it necessary, plaintiff should be permitted to amend the complaint to allege Federal question jurisdiction. 28 U.S.C. § 1653 (pleadings may be amended to show jurisdiction).

volves review in the Court of Federal Claims, the statute excludes fraud claims from this mechanism. 41 U.S.C. § 605(a).

The CDA does "not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud." *Id.* Courts applying this provision have universally concluded that the CDA does not extend to claims "involving fraud," and that district courts may assert jurisdiction over such claims. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1338, 1343-44 (E.D. Mo. 1996) ("[T]he plain language of the CDA specifically excludes 'claims involving fraud.'") (citation omitted); *accord United States v. Unified Indus., Inc.*, 929 F. Supp. 947, 951 (E.D. Va. 1996) ("[W]here events, transactions, and contracts at issue in the lawsuit give rise to fraud allegations, the CDA no longer applies.") (citations omitted); *United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218, 224 (D. Md. 1995) (claims "involving fraud" are an "important exception" to the CDA).

The fraud exception to the CDA encompasses not just claims for fraud itself, but also extends to claims "the factual bases of which are intertwined with allegations of fraud." *Unified Indus.*, 929 F. Supp. at 951; *see also United States v. Rockwell Int'l Corp.*, 795 F. Supp. 1131, 1135 (N.D. Ga. 1992) (court can take jurisdiction over common law claims "based upon Plaintiff's general allegations that Defendant has acted fraudulently in the course of its contract negotiations"); *United States v. JT Constr. Co.*, 668 F. Supp. 592, 594 (W.D. Tex. 1987) (where "the entire context" of the complaint shows fraud, "[i]t would be unrealistic to say that some claims in the present action 'involve fraud' and others do not"). The "involving fraud" exception therefore applies equally to non-fraud torts, quasi-contract and contract claims where the facts supporting those claims also support the fraud claim. *O'Keefe*, 918 F. Supp. at 1344 (claims that amount to different theory of recovery to fraud claims, including breach of contract, payment by mistake,

and unjust enrichment, fall under CDA fraud exception); *Mayman*, 894 F. Supp. at 224 (court refused to bifurcate on ground that contract breach issues will necessarily be pertinent to fraud claims).[17]

The factual bases for all of plaintiff's claims are factually intertwined with allegations of fraud. The complaint alleges fraud claims against AMS, including fraud, concealment, breach of fiduciary duty, and negligent misrepresentation. J.A. 49-53. Plaintiff alleges that AMS fraudulently induced the Board to enter into the contract, fraudulently performed the contract, and deliberately concealed system defects and its inability to perform, all in a scheme to win the contract and secure a stream of millions of dollars in progress payments. J.A. 6, 14, 18-22, 26, 33-34. These allegations, of course, support plaintiff's fraud claim. J.A. 49. Those same allegations are also incorporated into and help form the basis of plaintiff's claims for breach of contract, breach of fiduciary duty, negligence, negligent misrepresentation, unjust enrichment, and money paid by mistake. J.A. 48, 50-53. The CDA therefore does not preclude jurisdiction in the district court over any of these causes of action.

Further, even if some claims does not involve fraud, the district court may nonetheless exercise supplemental jurisdiction over them, notwithstanding the CDA, because they are part of the same case or controversy. *Rockwell*, 795 F. Supp. at 1135; *O'Keefe*, 918 F. Supp. at 1343-44. The exercise of supplemental jurisdiction is proper where "all other claims are so related to claims in the action within such original jurisdiction that they form part of the same case or con-

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[17] AMS cited certain cases below to assert that a "disguised contract action" cannot avoid CDA jurisdiction. Those cases, however, involve plaintiffs who attempt to circumvent the CDA by recasting claims in non-fraud tort language or as some statutory or regulatory violation. *United States v. J&E Salvage Co.*, 55 F.3d 985, 988 (4th Cir. 1995); *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 77 (D.C. Cir. 1985). Neither case included an actual fraud claim so they have no application here.

troversy." 28 U.S.C. § 1367(a). There can be no dispute that all causes of action against AMS meet this standard. All of plaintiff's claims relate to AMS's conduct in connection with the development of the record keeping system for the Fund. The same parties, events, and facts relate to each claim alleged in the complaint. This entire case is therefore properly in Federal district court.

It is irrelevant that AMS has separately filed a lawsuit against the United States seeking declaratory relief under the same contract in the Court of Federal Claims. As set forth below, that court's jurisdiction over *any* claim relating to the contract is in substantial doubt. *See infra* pp. 37-40. Moreover, AMS's second-filed suit against the United States should not disturb plaintiff's selection of this forum in its first-filed suit against AMS in the district court. *See Northrop Corp. v. United States*, 27 Fed. Cl. 795, 801 (1993) ("[T]he Court of Federal Claims follows the general rule that where more than one court has concurrent jurisdiction over the subject matter of a case, the 'doctrine of comity' requires that litigation continue in the court in which the suit first began."); *see also Food Fair Stores v. Square Deal Market Co.*, 187 F.2d 219, 220 (D.C. Cir. 1951). In any event, nothing prevents the district court from exercising concurrent jurisdiction over a suit involving a contract that is also being litigated in the Court of Federal Claims. *O'Keefe*, 918 F. Supp. at 1343. This case should therefore go forward in the district court.

B. The CDA Does Not Apply Because the Dispute Involves Non-Appropriated Funds Only.

The CDA does not apply to this dispute for an independent reason: a contract with a NAFI cannot be adjudicated in the Court of Federal Claims and therefore the CDA does not apply to disputes arising from agreements with NAFIs, even if the parties purport to agree to resolve disputes under the CDA. *See Furash & Co. v. United States*, 252 F.3d 1336, 1343-44 (Fed.

Cir. 2001) ("Congress . . . did not intend for the CDA to expand the [Court of Federal Claims's] jurisdiction to reach non-appropriated fund activities other than . . . those incorporated by reference in the CDA"); *Research Triangle Inst. v. Board of Governors of the Fed. Reserve Sys.*, 132 F.3d 985, 988 n.15 (4th Cir. 1997) (Tucker Act amendments left "undisturbed the general 'appropriated fund instrumentality' limitation on the Tucker Act's grant of jurisdiction," such that CDA applies only to enumerated non-appropriated fund activities).

As noted above, after this suit was filed in district court, AMS sued the United States on contract theories. The United States moved to dismiss AMS's complaint on the ground that the Board is a NAFI. The court denied the motion. The United States has informed the Board that it is considering pursuing an interlocutory appeal of that decision. Even if the Court of Federal Claims's decision were correct, however, this case should still proceed in district court because the complaint falls within the fraud exception to the CDA. Moreover, this Court need not defer to the Court of Federal Claims in determining whether the Board is a NAFI. *See A&S Council Oil Co. v. Lader*, 56 F.3d 234, 239 (D.C. Cir. 1995) (rejecting a jurisdictional determination of the Claims Court because "federal court may determine its own jurisdiction") (quotation marks and citation omitted).

Only non-appropriated funds are at issue in this dispute, and the Court of Federal Claims's contrary determination is error. The contract payments in question were drawn from the private monies held in the Fund. Those assets consist solely of amounts contributed by Federal employees, employing agencies for the employees' benefit, and the earnings on the investments of the Fund. 5 U.S.C. § 8437(b). Congress provided that the "employees own the money" in the Fund. H.R. Conf. Rep. No. 99-606, at 137, *reprinted in* 1986 U.S.C.C.A.N. at 1520. All expenses of the Fund's operating instrumentality, the Board, are paid out of employee forfeitures

of and earnings on these privately held monies. There has been no congressional appropriation of monies to benefit the Fund except for an initial start-up appropriation to cover certain Board expenses. *See* 5 U.S.C. § 8437(c)(3).[18]

No provision in FERSA permits the Board to use appropriated funds. On the contrary, in creating the System, Congress stated that it intended the Board to be an "off-budget agency." H.R. Conf. Rep. No. 99-606, at 138, *reprinted in* 1986 U.S.C.C.A.N. at 1521. Because Congress had no intention of funding the Board with appropriated funds on an ongoing basis, the Court of Federal Claims has no jurisdiction. *El-Sheikh v. United States*, 177 F.3d 1321, 1324 (Fed. Cir. 1999) ("If Congress has indicated that public funds shall not be involved, we cannot grant the relief requested.") (internal citation and quotation omitted); *Kyer v. United States*, 369 F.2d 714, 718 (Ct. Cl. 1966) ("To be actionable *in this court*, that contract must be one which, in the contemplation of Congress, could obligate public monies.").

AMS disputed that only non-appropriated funds are at issue here. AMS principally relied on the statement in 5 U.S.C. § 8437(c) that "[t]he sums in the Thrift Savings Fund are appropriated and shall remain available without fiscal year limitation." *See* J.A. 84. "Appropriated" is used here, however, in the sense of authorizing the deposit and withdrawal of the Fund's monies held in the Treasury, the Fund's depository institution. Using the Treasury as its bank, however,

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[18] The very name of that initial appropriation, "Temporary Alternative Funding," demonstrates that the Board was never intended to function through the use of appropriated funds in the future. Pub. L. No. 99-335, § 701, 100 Stat. at 631. A limited congressional appropriation such as this does not remove the Board's status as a NAFI. *See Pulaski Cab Co. v. United States,* 157 F. Supp. 955, 959 (Ct. Cl. 1958) (Whitaker, J., concurring) (Army exchange is a NAFI even though it has "from time to time" received appropriated money in furtherance of its activities). The statutory text and legislative history plainly demonstrate Congress intended the Fund be self-sufficient and not receive appropriated funds after the initial start-up appropriation. *See* S. Rep. No. 99-166, at 19-20, *reprinted in* 1986 U.S.C.C.A.N. at 1424-25; 5 U.S.C. §§ 8437(b), (c), (d), 8474(c)(5).

does not convert the Fund's private assets into public monies. *See Furash & Co. v. United States*, 46 Fed. Cl. 518, 524-25 (2000) (agency is a NAFI despite use of the word "appropriation" in its enabling statute), *aff'd*, 252 F.3d 1336 (Fed. Cir. 2001); *Aaron v. United States*, 51 Fed. Cl. 690, 692 (depositing NAFI funds in the Treasury does not change their character), *vacated on other grounds*, 52 Fed. Cl. 20 (2002).

AMS also contended that the Fund contains public monies because at some point they were appropriated to Federal agencies to pay their employees. Such an argument would federalize any private purpose to which a Federal employee might direct a paycheck. Obviously, monies do not remain "public" once paid out in exchange for goods and services. *See Aaron*, 51 Fed. Cl. at 693 ("The question is whether Congress contemplated appropriating funds *to* [the NAFI], not whether it is the indirect recipient of other agencies' appropriated funds."). Moreover, as noted above, the employees own the matching amounts contributed by agencies. *See* H.R. Conf. Rep. No. 99-606, at 137, *reprinted in* 1986 U.S.C.C.A.N. at 1520.

Because the monies in the Fund are neither appropriated nor public, the CDA does not apply to deprive the district court of jurisdiction over this matter.

CONCLUSION

Plaintiff seeks to pursue valuable claims against AMS. The vindication of these claims will benefit the Fund. The statute that created the Fund requires that such valuable claims be brought by the Executive Director, as the effective trustee of the Thrift Savings Fund, and further requires that such litigation occur independent of the "control – and therefore, veto," of the DOJ. *Mail Order*, 986 F.2d at 518. The district court erred, both in applying a "magic words" requirement to the question of litigation authority, and in failing to consider the text and legislative history of FERSA.

For the reasons set forth above, the district court's order should be reversed and vacated, and the case remanded for trial on the merits.

Respectfully submitted,

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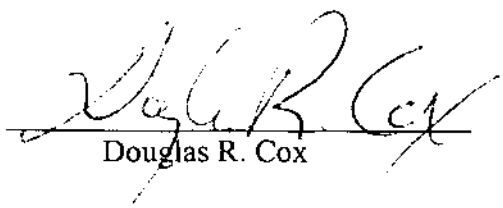
CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that the forgoing Brief of Appellant is 13,558 words, as measured by Microsoft Word 2000, a word processing program system that includes footnotes and citations in word counts.



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CERTIFICATE OF SERVICE

I, Jennifer G. Loy, hereby certify that two copies of the foregoing Brief of Appellants and one copy of the Joint Appendix were served this 22nd day of October 2002, via overnight delivery on each of the following:

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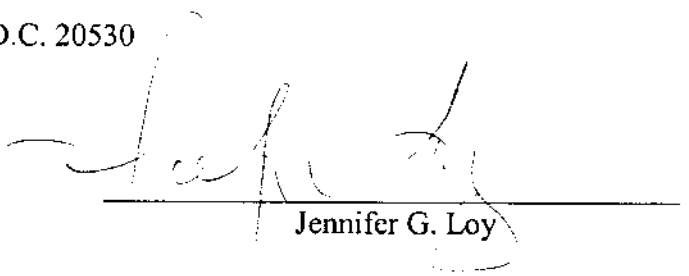

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